

This is a claim for injuries claimant sustained on September 17, 2004, when he fell while working for respondent. In the May 31, 2006, Award, Judge Foerschler granted claimant benefits for a 12 percent permanent partial general disability for neck and right upper extremity injuries. In addition, the Judge denied claimant's request for additional

temporary total disability benefits. Likewise, the Judge denied respondent and its insurance carrier's request for a credit for the monies respondent voluntarily paid claimant during the time he was unable to work. Finally, the Judge ordered that claimant retained the right to apply for future medical treatment or unauthorized medical expenses. The Judge did not address claimant's request for the payment of the outstanding medical expenses.

Claimant contends Judge Foerschler erred. Claimant argues (1) he is entitled to additional temporary total disability benefits in the sum of \$1,758.63; (2) he is entitled to receive \$500 in unauthorized medical benefits for services rendered by Dr. Michael J. Poppa; and (3) he is entitled to receive permanent disability benefits under K.S.A. 44-510e for a 24 percent whole person functional impairment for injuries to both upper extremities, his neck, and head. Consequently, claimant asks the Board to increase the May 31, 2006, Award.

Conversely, respondent and its insurance carrier request the Board to (1) find they are entitled to receive a credit against the award for payments respondent already made to claimant; (2) deny claimant's request for additional temporary total disability benefits; (3) deny claimant's request for unauthorized medical benefits; and (4) adopt the 12 percent right upper extremity rating provided by Dr. Chris D. Fevurly and, accordingly, award claimant permanent disability benefits under the schedules of K.S.A. 44-510d for injuries to his right upper extremity only. Therefore, they also request the Board to modify the Award.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injuries and disability?
2. How many weeks of temporary total disability benefits is claimant entitled to receive?
3. Is claimant entitled to an award of unauthorized medical benefits for the services rendered by Dr. Michael J. Poppa?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

On September 17, 2004, claimant fell from the peak of a two-story house that he was helping to roof. Claimant was rushed to the hospital, where he spent two or three days. Claimant's face, neck and arms were x-rayed. While there, a doctor set his

fractured left wrist and set his fractured right wrist with a pin. Later, claimant underwent a second surgery on his right wrist.

Following the accident, respondent learned there was a dispute whether it had workers compensation insurance coverage. Consequently, respondent paid claimant approximately \$3,500 while he recovered from his injuries. The parties agree respondent and its insurance carrier are entitled to a credit in this claim for that \$3,500.

Claimant recovered from his injuries and eventually returned to work for a waste management company, where he works 40 hours per week and regularly lifts up to 70 pounds. In addition, claimant testified in his present job he was earning approximately what he earned while working for respondent. Accordingly, claimant requests permanent disability benefits based upon his functional impairment rating.

At the February 2006 regular hearing, claimant described his present symptoms. Claimant's right hand is the most problematic as there is loss of range of motion, loss of grip strength, pain and numbness, and he has difficulty lifting heavier items. There is pain in the left hand every now and then and claimant feels he has experienced a loss of grip strength in that hand. And according to claimant, he occasionally experiences some tightness and achiness in his neck.¹

Following the accident, claimant also experienced seeing floaters. Claimant saw a specialist, Dr. Parelman, for an eye exam but no additional treatment was provided. Moreover, the record does not indicate that claimant has pursued any additional treatment for that condition.

1. How many weeks of temporary total disability benefits is claimant entitled to receive?

Claimant enlisted Dr. Michael J. Poppa to evaluate his injuries. The history taken by Dr. Poppa indicated claimant was released to return to work with restrictions on February 1, 2005, but that he had started his employment with the waste management company on January 26, 2005. Based upon that evidence, the Board finds claimant was temporarily and totally disabled from September 17, 2004, through January 25, 2005, a period of 18.57 weeks.

As indicated above, the parties agree respondent and its insurance carrier are entitled to receive a credit in the sum of \$3,500 for the payments respondent made to claimant while he was off work due to his injuries.

¹ R.H. Trans. at 13-15.

2. What is the nature and extent of claimant's injuries and disability?

Dr. Poppa examined claimant in April 2005 and recommended that claimant see a retinal specialist for the floaters he was experiencing in his left eye and that claimant continue with his home exercise program to strengthen the wrists and increase their range of motion. The doctor also concluded claimant is capable of performing his regular work duties.

Later, after receiving a report from Dr. Parelman, Dr. Poppa issued an additional medical report that set forth his opinions regarding claimant's permanent impairment. Dr. Poppa concluded claimant sustained a 10 percent whole person functional impairment for a head injury with chronic cervical strain and floaters involving the eyes. The doctor found claimant sustained a 24 percent (10 percent for decreased strength; 2 percent for decreased range of motion – flexion and 4 percent for decreased range of motion – extension; 10 percent for intra-articular fracture with bony deformity) right upper extremity impairment for the right distal forearm fractures and surgeries. In addition, Dr. Poppa determined claimant sustained an 11 percent (1 percent for decreased extension and 10 percent for the fracture) left upper extremity impairment for the left distal radius and ulna fractures. Dr. Poppa combined the various ratings and concluded claimant's permanent whole person functional impairment equaled 24 percent.

Dr. Poppa used the *AMA Guides*² (4th ed.) to rate claimant. The doctor, however, went outside the *Guides* to rate the fracture. The doctor explained that the diagnosis of intra-articular fracture with bony deformity is a diagnosis not specifically addressed by the *Guides*. But the doctor believed it was an impairing condition as over time it will cause increased stiffness, degenerative changes, and decreased function.

More importantly, Dr. Poppa concluded claimant will eventually require nonsteroidal antiinflammatory medications for treatment of the arthritic complaints, which the doctor expects with time will develop, especially in the right wrist.

Respondent and its insurance carrier enlisted Dr. Chris D. Fevurly to evaluate claimant for purposes of this claim. Dr. Fevurly examined claimant in January 2006 and concluded that claimant sustained a 12 percent (7 percent for loss of flexion, 3 percent for loss of extension, and 2 percent for probable superficial dorsal digital nerve injury) right upper extremity impairment as measured by the *AMA Guides* (4th ed.). Dr. Fevurly found no rateable impairment in claimant's left upper extremity as the doctor believes the left wrist fracture healed in proper alignment. Furthermore, there was full range of motion and no neurological deficit in that wrist. Likewise, the doctor found no residual impairment in

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

claimant's neck as claimant was not having any symptoms and there was full range of motion. Similarly, the doctor found no evidence of impairment from the floaters.

Dr. Fevurly disagreed with Dr. Poppa's ratings for intra-articular fracture with residual bony deformities. According to Dr. Fevurly, a doctor should not add additional impairment for a condition that is not in the *Guides* when the doctor has already included the impairment from that condition based upon lost range of motion or power or sensory deficit.

Considering the doctors' ratings in light of claimant's testimony regarding his present symptoms, the Board finds Dr. Fevurly's opinions the more persuasive. The Board finds the greater weight of the evidence establishes that claimant sustained a 12 percent permanent impairment to his right upper extremity as a result of his September 17, 2004, accident. Consequently, claimant is entitled to receive disability benefits under the schedules of K.S.A. 44-510d for a 12 percent disability to his right forearm.

3. Is claimant entitled to receive unauthorized medical benefits for the services rendered by Dr. Michael J. Poppa?

The Workers Compensation Act provides that without application or approval an injured worker may consult a health care provider of choice for the purpose of examination, diagnosis, or treatment. But the amount allowed for such services is limited to no more than \$500.³

Claimant saw Dr. Poppa on April 21, 2005. The doctor examined claimant, provided a diagnosis, and recommended that claimant be evaluated by a retinal specialist and that he continue his exercise program to strengthen the wrists and increase their range of motion. Dr. Poppa also evaluated claimant's ability to work, addressed how claimant's condition may later progress, and considered claimant's potential needs for additional medical treatment. Those services and opinions have value. Accordingly, claimant is entitled to payment for those services as unauthorized medical benefits in the sum of \$500, which is the sum Dr. Poppa charged for his April 21, 2005, examination and report.

AWARD

WHEREFORE, the Board modifies the May 31, 2006, Award entered by Judge Foerschler.

³ K.S.A. 2005 Supp. 44-510h(b)(2).

Kevin E. West is granted compensation from Hixon Brothers Contracting and its insurance carrier for a September 17, 2004, accident and resulting disability. Based upon an average weekly wage of \$400, Mr. West is entitled to receive 18.57 weeks of temporary total disability benefits at \$266.68 per week, or \$4,952.25, plus 21.77 weeks of permanent partial disability benefits at \$266.68 per week, or \$5,805.62, for a 12 percent permanent disability to the right arm at the wrist, making a total award of \$10,757.87, which is all due and owing less any amounts previously paid.

Respondent and its insurance carrier are entitled to a credit of \$3,500 for monies respondent previously paid.

Respondent and its insurance carrier shall pay, subject to the fee schedule, the outstanding medical expenses claimant incurred for treatment of the injuries he sustained in the September 17, 2004, accident.

Unauthorized medical benefits in the amount of \$500 shall be paid by respondent and its insurance carrier.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Nikki Cannezzaro, Attorney for Respondent and its Insurance Carrier